Boston College Law Review

Volume 25
Issue 4 *Number 4*

Article 7

7-1-1984

The Public Interest Standard in the Communications Act and the Hearing Impaired: Community Television of Southern California v. Gottfried

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The Public Interest Standard in the Communications Act and the Hearing Impaired: *Community Television of Southern California v. Gottfried*[1] — The Communications Act of 1934[2] was enacted to assure rapid, efficient radio service for all the people of the United States.[3] The statute established the Federal Communications Commission ("FCC" or the "Commission") to enforce and execute its purposes.[4] Pursuant to the provisions of the Communications Act, the Commission may approve an application for the renewal of a broadcasting license whenever it determines that the "public interest, convenience and necessity would be served thereby."[5] The renewal may be granted without a hearing if the application meets certain FCC requirements.[6]

Under the Communications Act, when a broadcaster seeks a license renewal, any party in interest may petition the FCC to deny the license application.[7] Parties in interest include responsible representatives of the listening public, as well as persons who can show economic injury and electrical interference.[8] If the allegations in the petition raise substantial and material questions of fact, the Commission will designate the license application for a hearing on the specific issues presented.[9] On the other hand, if the Commission finds that the petition does not present substantial questions of fact and that a grant of an application would not be prima facie inconsistent with the public interest, it will deny the petition and grant the license renewal.[10] Congress has delegated broad discretionary authority to the Commission to determine the components of the public interest standard against which it measures a licensee's application, requiring only that the test be based on the purposes of the Communications Act.[11] Recognizing this broad discretion, the courts have consistently upheld the FCC's determinations under this standard.[12]

When confronted with federal legislation other than the Communications Act that may have an impact on the public interest standard, the FCC decides whether or not to

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[1] 459 U.S. 498 (1983).

[2] 47 U.S.C. § 151 (1976).

[3] *Id.*

[4] *Id.*

[5] 47 U.S.C. § 307(d) (1976). Although the origin of the phrase "public convenience, interest and necessity" is unclear, a former FCC chairman stated that the phrase was suggested to Senate drafters of the Communications Act who were struggling to define a regulatory standard by a young lawyer on loan from the Interstate Commerce Commission. M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW, 650-51 (2d ed. 1982)[hereinafter cited as FRANKLIN]. Other federal statutes, such as the Transportation Act, used that guideline. *Id.*, citing H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 54-55 (1962). The standard, however, loses meaning under the Communications Act, where the issue is seldom whether there is a need for broadcasting service but rather who shall supply it. *Id.*

[6] 47 C.F.R. § 73.3591 (1982). The application must not present any material or substantial question of fact and must meet the following requirements: (1) that another mutually exclusive application is not pending; (2) that the applicant is legally, technically, financially and otherwise qualified; (3),that the applicant is not in violation of provisions of law, the FCC rules, or established policies of the FCC; and (4) that a grant of the application would otherwise serve the public interest, convenience and necessity. *Id.*

[7] 47 U.S.C. § 309(d)(1) (1976).

[8] In Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1002 (D.C. Cir. 1966), the court found that the listening public is a party in interest and has standing to contest a renewal application.

[9] 47 U.S.C. § 309(e) (1976).

[10] 47 U.S.C. § 309(d)(2) (1976).

[11] *See* National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943).

[12] *See infra* notes 77-81 and accompanying text.

incorporate the policies expressed in that legislation.[13] One example of a statute which has a potential effect on the FCC's duties under the Communications Act is the Rehabilitation Act of 1973.[14] The Rehabilitation Act[15] was passed to insure the civil rights of the handicapped.[16] Legislative history of the act reveals that Congress intended to integrate the handicapped into normal living, working and service patterns.[17] To help effect this policy, section 504 of the Rehabilitation Act prohibits recipients of federal financial assistance from discriminating against otherwise qualified handicapped persons.[18] The United States Supreme Court considered the question of the interaction of the policies underlying the Communications Act and the Rehabilitation Act in *Community Television of Southern California v. Gottfried* .[19]

The controversy in *Community Television* arose in 1977 when Sue Gottfried, a hearing impaired individual, petitioned the FCC to deny the license renewal applications of eight Los Angeles television stations for violating section 504 of the Rehabilitation Act and for failing to ascertain the needs of the deaf and hearing impaired in their service area.[20] Seven of the stations seeking renewal were commercial stations.[21] The other was a noncommercial or public station.[22] In addition to the general allegations raised against all the stations, Ms. Gottfried specifically charged that the public station had refused to air a captioned version of ABC News prior to May of 1977, even though the service was available through the Public Broadcasting Service.[23] When the station finally began to air the program, the petition stated, the program was still not broadcast during prime time.[24]

The FCC denied Gottfried's petition, finding that the facts alleged failed to raise any substantial or material question as to whether granting the license renewals would serve the public interest.[25] Licensees, the Commission stated, were not required to provide

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[13] *See infra* notes 82-87 and accompanying text.

[14] *See* Community Television of Southern California v. Gottfried, 459 U.S. 498 (1983).

[15] 29 U.S.C. § 701 (1976).

[16] *Id.*

[17] Note, *Death Knell for Trageser: Section 504 of the Rehabilitation Act in Light of North Haven*, 85 W. VA. L. REV. 371, 385 (1983).

[18] Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1976). Section 504 provides: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

[19] 459 U.S. 498 (1983).

[20] License Renewal Applications, 69 F.C.C.2d 451, 451-52 (1978). The petitions were filed by Gottfried, individually and on behalf of the deaf and hearing impaired in the Los Angeles area. *Id.* at 451. Petitioners sought denial of license renewals to eight stations. *Id.*

[21] The seven commercial stations are KABC-TV, American Broadcasting Companies, Inc.; KCOP-TV, KCOP Television, Inc.; KHO-TV, RKO General, Inc.; KNBC-TV, National Broadcasting Co., Inc.; KNXT-TV, CBS, Inc.; KTLA-TV, Golden West Broadcasters; and KTTY-TV, Metromedia, Inc. Gottfried v. FCC, 655 F.2d 297, 300 n.1 (D.C. Cir. 1981).

[22] *Id.* The noncommercial station was KCET-TV, Community Television of Southern California.

[23] License Renewal Applications, 69 F.C.C.2d at 458 n.9 (1978).

[24] *Id.*

[25] *Id.* at 459. Ms. Gottfried's petition alleged that the licensees' efforts to ascertain the community's needs and interests were defective particularly in respect to the hearing impaired in the community, and that the stations violated the Rehabilitation Act of 1973 because their past programming did not meet the needs of the deaf. *Id.* at 452. In response, the Commission found that its regulations on ascertainment do not require that stations specifically seek out representatives of the deaf when conducting their survey of community needs. *Id.* at 456. According to the Commission,

either closed or open captioning, although the FCC encouraged stations to experiment with ways to meet the needs of the hearing impaired and required television licensees to broadcast emergency information visually.[26] According to the Commission, stations are not specifically required to ascertain and provide for the needs of the deaf.[27] The Commission recognized that the single noncommercial station involved in the controversy might fall within the purview of the Rehabilitation Act, but stated that the FCC was not the proper agency to determine whether a violation of section 504 of that statute had occurred.[28]

After Gottfried brought a petition to reconsider, the FCC reaffirmed its prior decision.[29] The Commission again discussed Gottfried's claim that section 504 of the Rehabilitation Act required denial of the license renewal applications. Noting that the provision applies only to licensees receiving federal financial assistance, the Commission concluded that section 504 does not apply to commercial stations.[30] Concerning the public station, the Commission stated that absent an adverse finding by the proper agency against the station, any action on its part would be premature.[31] The FCC also found that it was not required to adopt regulations to implement section 504 because the FCC does not extend federal financial assistance to its licensees.[32] The Commission noted that only agencies empowered to extend financial assistance were required to promulgate such rules.[33] In addition, the Commission found no error in its earlier determination that the licensees were serving the public interest.[34] Because no requirement to provide captioning

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however, the licensees did include leaders from groups aware of the problems of the hearing impaired in their surveys. *Id.* at 456-67. Concerning programming, the Commission found evidence of programs about the deaf, but few for the deaf. *Id.* at 457. The Commission did, however, list programs offered by the licensees with visual components making them accessible to the hearing impaired. *Id.* at 457-58, n.8,9. Because the Commission had no requirement that stations use specialized techniques such as captioning or sign language that render the programs accessible to the deaf, however, the Commission concluded that it would not find a licensee at fault for not providing such programs. *Id.* at 458. Addressing the issue of violation of the Rehabilitation Act, the Commission noted that until the agency designated to consider such matters reviewed an alleged violation, the Commission had no reason to consider such allegations. *Id.* at 459.

[26] *Id.* at 454-55. "Open" captioning involves the transmission to all viewers of a printed display of text at the bottom of the television screen. *Id.* at 454. "Closed" captioning requires the use of an encoder at the transmitting end and a decoder at the receiving end. *Id.* With closed captioning, the visual display of text can be seen only by persons owning television sets equipped with a decoder. *Id.*

[27] *Id.* at 455, (citing Ascertainment of Community Problems by Broadcast Applicants (Renewal Primer), 57 F.C.C.2d 418 (1976); Ascertainment of Community Problems by Noncommercial Broadcast Applicants, Permittees, and Licensees (Noncommercial Primer), 58 F.C.C.2d 526 (1976)).

[28] License Renewal Applications, 69 F.C.C.2d at 459. The FCC stated that the Department of Health, Education and Welfare, ("HEW"), was the proper governmental agency to determine whether a public television station violated the Rehabilitation Act. *Id.* The FCC noted that it would take any adverse findings into consideration. *Id.*

[29] License Renewal Applications (Petition for Reconsideration), 72 F.C.C.2d 273, 281 (1979). On reconsideration, Gottfried argued that the Commission should deny the renewal applications because of the licensees' failure to observe the national policy of nondiscrimination against the handicapped. *Id.* at 274. Further, the petitioner alleged that the FCC abrogated its duty to issue regulations enforcing section 504 of the Rehabilitation Act pursuant to HEW regulations. *Id.* at 276.

[30] *Id.* at 276.

[31] *Id.* at 278.

[32] *Id.*

[33] *Id.* at 278.

[34] *Id.* at 279.

existed during the term of the previous license, the FCC decided that it would be unfair to judge a licensee's renewal application adversely based on the station's failure to provide such programming.[35] Gottfried then appealed the Commission's decision to the District of Columbia Court of Appeals pursuant to section 402 of the Communications Act.[36]

The Court of Appeals vacated the portion of the Commission's order that rejected the application to deny renewal of the public station's license, but upheld the portion concerning the seven commercial licensees.[37] The court found that different standards relating to service to the hearing impaired were applicable in determining whether to renew the licenses of noncommercial and commercial broadcast stations.[38] Because public television stations receive federal financial assistance and are therefore subject to section 504 of the Rehabilitation Act,[39] the court stated, the FCC was obligated, at a minimum, to inquire into the station's efforts to meet the needs of the hearing impaired in making its public interest determination.[40] While recognizing that substantial deference must be given to the Commission's judgment in construing the public interest standard, the appeals court found that the FCC must consider the national policy of nondiscrimination against the handicapped minority expressed in the Rehabilitation Act when acting on renewal applications for public television stations.[41] The court stated that, in contrast, the seven commercial stations were not specifically obligated to consider the needs of the handicapped under the Rehabilitation Act because section 504 applies only to entities receiving federal funds.[42] Commission renewal of broadcast licenses, the court noted, did not constitute financial assistance.[43] Stating that the Rehabilitation Act reflected a strong policy favoring increased opportunities for the hearing impaired, the court reasoned that the Communications Act requirement that broadcast licensees serve the public interest incorporated the policy goal of the Rehabilitation Act.[44] Thus, the court concluded, under the Communications Act mandate that licensees serve the public interest, even commercial stations are required to make some accommodations for the hearing impaired.[45] The court deferred to the Commission's judgment that the commercial licenses be renewed, however, because of the FCC's special competence in the technological and economical aspects of captioned programming.[46]

Both the Commission and the public licensee petitioned the Supreme Court for

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[35] *Id.* The Commission also noted that it might be necessary to make rules to insure programming for the hearing impaired in the future should the present policy of encouraging experimentation with closed captioning prove unsuccessful. *Id.* at 281.

[36] Gottfried v. FCC, 655 F.2d 297, 305 (D.C. Cir. 1981).

[37] *Id.* at 301.

[38] *Id.*

[39] The HEW, which originally had responsibility for enforcement of the Rehabilitation Act, took the position that section 504 applied to public broadcasting stations receiving federal financial assistance. *Id.* at 303 n.22.

[40] *Id.* at 307.

[41] *Id.* at 308. The court noted that it is a "settled proposition that a federal agency, in construing the requirements of 'public interest' under its governing statute, must at least give weight to federal laws and public policies addressed to similar purposes," even though responsibility for enforcement is vested in another agency. *Id.*

[42] *Id.* at 312.

[43] *Id.*

[44] *Id.* at 315.

[45] *Id.*

[46] *Id.* at 315-16.

review of the Court of Appeals' decision. The Supreme Court granted certiorari[47] in order to address the implications of the Court of Appeals' holding on the status of licenses of public broadcasting stations.[48] In a seven-to-two decision, the Supreme Court held that the FCC did not abuse its discretion in interpreting the public interest standard by refusing to impose a greater obligation to provide special programming for the hearing impaired on a public licensee than on a commercial licensee.[49]

The Supreme Court's decision in *Community Television* is significant for two reasons. First, the Court reaffirmed and extended the FCC's broad discretionary power to interpret the public interest standard in the Communications Act.[50] The Court found that the Commission's authority included the ability to ignore national policy expressed in other federal statutes.[51] Second, by confirming that the Commission, in considering whether to grant a renewal application, may choose to ignore whether or not its licensees are complying with legislation the FCC is not specifically designated to enforce,[52] the Court sent a clear message to Congress regarding the drafting of future legislation. When promulgating laws that could potentially impact on a federal agency's duties under existing legislation, Congress must clearly state whether it intends the national policy embodied in the new legislation to be considered by an agency in carrying out a prior statute.[53]

This casenote will begin by discussing the public interest standard included in the Communications Act and the interpretation the FCC and the courts have given the requirement. This discussion will establish the context in which *Community Television of Southern California v. Gottfried* was decided. In the second section, the policies and purposes of the Rehabilitation Act will be applied to the area of broadcasting and the obligations of the FCC. It will be submitted that an agency has a duty to consider national policy expressed in legislation other than the agency's own enabling act. The third section describes the Supreme Court's decision in *Community Television*. Finally, the article analyzes the Court's opinion. This analysis demonstrates that the *Community Television* Court focused solely on the language of the Rehabilitation Act and ignored the purpose of the Communications Act, which is to assure the benefits of telecommunications to all the people of the United States. It will be submitted that the Court's deference to the FCC's interpretation of the components of the public interest standard was misplaced in view of the FCC's failure to take positive steps to provide the hearing impaired with access to television and because of the FCC's movement toward deregulation of the broadcasting industry. In addition, the discussion will demonstrate that the Court in *Community Television* modified the principle enunciated in previous decisions that an agency, in making decisions concerning the public interest, should consider the policies expressed in relevant laws other than the statutes the agency is empowered to enforce. It will be suggested that Congress should review the FCC's duties under the Communications Act and require the FCC to promulgate standards and regulations insuring access of all persons to the benefits of telecommunications. Specifically, the FCC should set standards concerning

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[47] 454 U.S. 1141 (1982). Both the FCC and the licensee, public television station KCET-TV, petitioned for certiorari.

[48] Community Television of Southern California v. Gottfried, 459 U.S. 498, 508 (1983).

[49] *Id.* at 500, 513.

[50] *See infra* notes 153-71 and accompanying text.

[51] *See infra* notes 154-63 and accompanying text.

[52] *See infra* notes 157-63 and accompanying text.

[53] *See infra* note 239 and accompanying text.

captioning technology for the broadcasting industry. In addition, the Commission should set a minimum on the amount of captioned programming a station must offer.

I. The Interpretation of the Public Interest Standard in the Communications Act

The Communications Act empowers the FCC to grant applications for new broadcast licenses and subsequent license renewals if the Commission determines that renewal would be in the public interest.[54] The Supreme Court has held that Congress gave the Commission broad discretionary power to define the components of the public interest standard.[55] As the Court has noted, the Act's legislative history reveals Congress' concern that a balance be established between the broadcaster's need for journalistic independence and his statutory obligation to consider the public's interest in securing the benefits of telecommunications.[56] The Commission must be flexible in finding the best way to insure that licensees operate in the public interest but still retain control over the selection of their broadcast material.[57]

The broad authority given the FCC to determine the components of the public interest criterion, however, was not intended to be so extensive as to confer unlimited power on the Commission.[58] In 1943, in *National Broadcasting Co. v. United States*,[59] the Supreme Court established general guidelines for determining this standard.[60] The *National Broadcasting* Court addressed a challenge to the FCC's authority to issue regulations defining permissible relationships between the networks and their local affiliates.[61] The public interest sought to be served under the Communications Act, the Court stated, was the interest of the listening public in the larger and more effective use of radio.[62] An important factor in considering the listening public's interest, the Court noted, was the ability of a licensee to render the best practicable service to the community it serves.[63] The *National Broadcasting* Court upheld the FCC's authority to issue regulations designed to correct abuses of chain broadcasters after the Commission had found that too much network control over local programming was not in the public interest. In *National*

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[54] 47 U.S.C § 307(a) (1976). In addition, the basic qualifications for licensees can be found in 47 U.S.C. § 308(b). All applications " . . . . shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications . . . ." *Id.*

[55] *E.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 593-94 (1981).

[56] Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 104-10, 125 (1973). The licensee has an obligation as a "public trustee" to provide balanced coverage of issues and events but has broad discretion to decide how to meet this obligation. *Id.* at 118. *See also*, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966). A broadcaster is not in the same category as a newspaper in terms of the public obligation imposed by law. *Id.* Rather, a broadcaster seeks and receives free and exclusive use of a limited and valuable resource. *Id.* When it accepts a license, the broadcaster becomes burdened by enforceable public obligations. *Id.*

[57] Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 122-24 (1973).

[58] National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943).

[59] 319 U.S. 190 (1943).

[60] *Id.* at 216.

[61] *Id.* at 209-10.

[62] *Id.* at 216.

[63] *Id.* (citing Federal Communications Comm'n v. Sanders Radio Station, 309 U.S. 470, 475 (1940)).

Broadcasting, therefore, the Court limited the FCC's discretionary authority by requiring the Commission to consider the listening public's need for adequate broadcast service in a particular community when determining whether a licensee will serve in the public's interest.[64]

The Supreme Court's interpretation of "public interest" in other legislation provides an additional limitation on the FCC's discretion in defining that term under the Communications Act. Consistently, the Court has held that the words "public interest" should be construed in accordance with the purposes of the regulatory legislation in which the words are contained. In the Court's view, the term does not constitute a broad license to promote the general public welfare.[65] For example, in *NAACP v. FPC*[66] the Supreme Court considered whether the Federal Power Commission ("FPC") has the authority to prohibit discriminatory employment practices by its regulatees.[67] The NAACP argued that the FPC was charged with promoting the public interest in general, including encouraging an end to discrimination in employment, because of references to the public interest in the Power and Gas Acts.[68] In considering this argument, the Court looked to the purposes behind the Power and Gas Acts to determine the meaning and content of the term "public interest."[69] The Court found that the purpose of the acts was to promote the production of energy at reasonable rates, and not to eliminate discrimination in employment.[70] Consequently, the Court held that the FPC could only consider the effects of discriminatory employment practices by its regulatees in relation to how such practices affected the establishment of just and reasonable rates.[71]

Similarly, in *New York Central Securities Corp. v. United States*,[72] the Supreme Court held that the public interest standard in the Transportation Act[73] referred to the purposes and requirements of that statute and not to the public's general welfare.[74] In the *New York Central* case, the Court rejected the argument that Congress' delegation of authority to the Interstate Commerce Commission ("ICC") was invalid because the public interest standard was too vague.[75] Instead, the Court found that the purpose of the Transportation Act — to provide economical and efficient transportation to the public — furnished substance to the public interest standard sufficient to guide the ICC in interpreting the standard.[76]

Despite these judicial guidelines, however, the FCC's discretion in interpreting the Communications Act's public interest standard remains broad. The Supreme Court has shown great deference to the experience and expertise of the FCC in considering challenges to the Commission's interpretation of the public interest standard in licensing and rulemaking procedures.[77] The Court has stated that it will reverse the decisions of the

[64] *National Broadcasting*, 319 U.S. at 218, 224.

[65] NAACP v. FPC, 425 U.S. 662, 669 (1976).

[66] *Id.* at 662.

[67] *Id.* at 663.

[68] *Id.* at 666. The Gas and Power Acts referred to are the Federal Power Act, 16 U.S.C. § 791a (1982) and Natural Gas Act, 15 U.S.C. § 717 (1982).

[69] NAACP v. FPC, 425 U.S. at 669.

[70] *Id.* at 669-70.

[71] *Id.* at 671.

[72] 287 U.S. 12 (1932).

[73] The Transportation Act is found at 49 U.S.C. § 1 (1976).

[74] 287 U.S. at 24-25.

[75] *Id.*

[76] *Id.*

[77] *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 593-94 (1981); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 803 (1978).

FCC only if the Commission's position is arbitrary, capricious, or unreasonable.[78] Furthermore, the Court has established that, in considering the purposes of a statute which contains a public interest criterion, the agency's interpretation should be followed unless there are compelling indications that the agency is wrong.[79] As a result, the courts have been especially deferential to the FCC where the Commission's decisions concerning the public interest are based on judgmental or predictive conclusions.[80] The Supreme Court has found that Congress delegated the task of weighing competing policies to the FCC, not to the courts.[81]

The discretion granted the FCC by Congress gives the Commission the option to consider the policies embodied in federal statutes other than the Communications Act when determining whether stations have fulfilled the public interest standard in licensing proceedings.[82] In addition, the FCC can incorporate other government policies into its regulations.[83] The Commission has exercised this option and taken a number of different statutes into account. For example, although the FCC does not have the power to enforce antitrust laws, it may, and has, incorporated antitrust policies into the Communications Act's public interest standard through its rulemaking powers.[84] In *FCC v. National Citizens Committee for Broadcasting*,[85] the Supreme Court supported the FCC's position and held that the FCC has the authority to promulgate regulations to promote diversification of the media.[86] Similarly, because the Commission recognizes that the public interest is not served by licensees who discriminate in employment, the FCC requires stations to file information about projects designed to provide equal employment opportunities to minorities.[87] These regulations reflect the FCC's decision to formally adopt national

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[78] *See* Administrative Procedure Act § 104, 5 U.S.C. § 706(2)(A) (1976).

[79] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

[80] NAACP v. FCC, 682 F.2d 993, 1001 (D.C. Cir. 1982). In this case the court of appeals upheld the FCC's decision to abandon its policy of requiring evidentiary hearings on applications involving television ownership concentration. *Id.* at 996. The court noted that when concepts as elusive as diversity of ownership are involved, the FCC has leeway to balance the competing policy considerations and choose an appropriate course of action so long as it bases its decision on rational grounds. *Id.* at 1001-02.

[81] FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 810 (1978).

[82] *See, e.g.*, FCC v. National Citizens Committee for Broadcasting, 436 U.S. at 795.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 775.

[86] *Id.* at 802. During hearings on the multiple ownership rules, the FCC stated, "To be sure, the fact that we do not enforce the antitrust laws per se shows that we are not required to apply specific antitrust criteria in measuring the adequacy of competition in any given case, as if the relationship between competition and the public interest were apodictic. . . . .But we are hardly barred from concluding that competition is what the public interest requires . . . ." Multiple Ownership, 50 F.C.C.2d 1046, 1117 (1975). The multiple ownership regulations reflect a general policy within the FCC. For example, the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394-95 (1965), emphasizes the diversification factor in comparative hearings. The diversification regulations also reinforce the congressional policy embodied in the Communications Act itself, which states that any licensee found guilty of violation of any antitrust laws shall have its license revoked, subject to appeal or review. 47 U.S.C. § 313 (1976).

[87] *See* 47 C.F.R. § 73.2080 (1982). In addition, a model EEO program can be found in Nondiscrimination in Employment Practices (Broadcast), 60 F.C.C.2d 226, 249-52 (1976). *But see* Bilingual Bicultural Coalition v. FCC, 595 F.2d 621 (D.C. Cir. 1978). In discussing FCC recognition that the public interest is not served by licensees who engage in intentional employment discrimination, the court stated: "This is not to say . . . that the FCC in considering license renewals is charged with an

policies on antitrust and equal employment as components of the public interest standard.

Although, as indicated, the Commission serves as an overseer and guardian of the public interest through its licensing and rulemaking functions, the listening public also has an opportunity to express its viewpoint. The most significant opportunity afforded to the public to voice opinions is provided in license renewal proceedings.[88] Indeed, in *Office of Communication of the United Church of Christ v. FCC*,[89] the Court of Appeals for the District of Columbia noted that the public may even have a duty to take an active interest in the scope and quality of broadcast services.[90] The court in *United Church of Christ* found that the listening public had standing to contest the renewal of a broadcast license.[91] In the context of license renewal proceedings, public participation takes the form of petitions to deny,[92] informal objections,[93] and complaints[94] to the FCC.[95]

The Commission considers such input from the public in determining whether a formal hearing is necessary to evaluate whether or not a licensee is operating in the public interest.[96] For several reasons, however, formal hearings on license renewal applications are infrequent.[97] Because of the expense and delay involved in scheduling a hearing, the

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undifferentiated mandate to enforce the antidiscrimination laws: the FCC is not the Equal Employment Opportunity Commission (EEOC), and a license renewal proceeding is not a Title VII suit." *Id.* at 628. In view of the purposes of its regulatory legislation, the FCC analyzes the employment practices of its licensees only to the extent those practices affect the licensee's obligation to provide programming that reflects minority interests and raise questions concerning the character qualifications of the licensee. *Id.*

[88] Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 110 (1973).

[89] 359 F.2d 994 (D.C. Cir. 1966).

[90] *Id.* at 1003. The court noted that although the FCC represents and is the prime arbiter of the public interest, the Commission has many duties and cannot monitor the performance of every one of thousands of licensees. *Id.* The FCC depends on public reaction as a reliable test of ideas and performance in broadcasting. *Id.* Responsible representatives of the listening public therefore have standing as parties in interest to contest renewal of a broadcast license before the FCC. *Id.* at 1002. For an overview of public involvement in the license renewal, see Chamberlin, *Lessons in Regulating Information Flow: The FCC's Weak Track Record in Interpreting the Public Interest Standard*, 60 N.C.L. REV., 1057 (1982) [hereinafter cited as Chamberlin]. The author states that in regard to public issues programming, the FCC has relied on complaints from the public about failure of licensees to fulfill their public interest responsibilities, rather than initiating action against a licensee itself. *Id.* at 1097.

[91] *United Church of Christ*, 359 F.2d at 1003.

[92] Petitions to deny a new or renewal application are formal filings that contain allegations of fact sufficient to show that the petitioner is a party in interest and that grant of the application would be prima facie inconsistent with the public interest standard. 47 C.F.R. § 73.3584 (1982). The allegations must be supported by affidavits, unless official notice is taken of them. *Id.*

[93] Informal objections may be filed by any person prior to FCC action on an application. 47 C.F.R. § 73.3587 (1982). These objections may be submitted in letter form. *Id.* Rules on limitations on pleadings and time for filing do not apply to an informal objection. *Id.*

[94] The Complaints and Compliance Division of the Broadcast Bureau, a principal staff unit of the FCC, is responsible for investigating complaints and answering general inquiries from the public regarding radio and television services. 47 C.F.R. § 0.71 (1982).

[95] Radio Broadcasting Services; Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licenses, 46 Fed.Reg. 26236, 26239 (1981).

[96] *Id.*

[97] *See, e.g.*, 45 FCC ANN. REP. 35 (1979). In fiscal year 1979, the FCC received 3635 license renewal applications for radio AM and FM stations and television stations. *Id.* It acted on 2433 of them. *Id.* Only six AM radio stations and two television stations were designated for evidentiary hearings on various issues. *Id.*

FCC regards a formal proceeding as, in effect, a sanction.[98] Consequently, the FCC has conducted hearings only when it found that the challenged licensee could not be encouraged to improve its service or that there was substantial evidence that the licensee was not acting in the public's interest.[99] Furthermore, the Commission considers a denial of renewal to be too harsh a penalty for all but the most serious violations of rules or other misbehavior.[100] A study of license revocations and denials of renewals from 1968-78 revealed that, out of the approximately three thousand renewal applications considered each year,[101] the FCC withdrew the licenses of only sixty-four radio and television stations during that ten-year period.[102] The FCC, therefore, seldom denies a license renewal application.

The FCC's handling of the public interest standard has engendered much criticism.[103] Although the Supreme Court has characterized the standard as "a supple instrument" which allows the FCC to carry out the legislative policy of Congress,[104] critics have argued that the Commission's failure to interpret the public interest standard through prospective regulations or statements which clearly convey the scope and intent of FCC policies leads to uncertainty about what requirements an applicant must meet to fulfill the statutory standard.[105] For example, questions arise as to what factors the Commission will give the most weight when determining which applicant will best serve the public interest in comparative broadcast hearings.[106] In its *Policy Statement on Comparative Broadcast Hearings*,[107] the Commission noted that its membership is not static and that the views of individual Commissioners may change.[108] Moreover, the Commission stated that it makes policy changes whenever it deems changes to be appropriate, either by ruling in individual cases or by issuing general statements.[109] Determinations of what comprises the public interest therefore may vary as the composition or tenor of the Commission changes. Consequently, applicants competing for the same license cannot be certain which of the criteria set forth in the Communications Act, and in a variety of policy statements, rules

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[98] Chamberlin, *supra* note 90, at 1098 n.248.

[99] *See generally id.* at 1098; 47 U.S.C. § 309(e) (1976).

[100] FRANKLIN, *supra* note 5, at 770.

[101] *Id.* at 769.

[102] Weiss, *Station License Revocations and Denials of Renewal 1970-78*, 24 J. OF BR. 69 (1980).

[103] *See e.g.*, Fowler, *The Public's Interest*, 56 FLA. B. J., 213 (1982) [hereinafter cited as Fowler] (Commission should defer as much as possible to broadcaster's judgment about how best to compete for viewers and listeners in programming because this deference would best serve public interest); Scott, *Licensing By Choice, Chance, or Chicanery?*, 35 AD. L. REV. 37 (1983) [hereinafter cited as Scott] (characterizing public interest standard as vaporous and meaningless in his criticism of merit selection of licensees).

[104] FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981) (citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940)).

[105] *See* Chamberlin, *supra* note 90, at 1097.

[106] *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). The Commission conducts comparative hearings when two or more qualified applicants seek the same or interfering facilities. FRANKLIN, *supra* note 5, at 751. In a comparative proceeding, the applicant must meet more than the minimum qualifications for a license. *Id.* The additional criteria by which the Commission will judge the applicant have evolved through adjudication and not through formal rulemaking procedures. *Id.* at 752

[107] 1 F.C.C.2d at 393.

[108] *Id.* at 393, 399.

[109] *Id.* at 399.

and decisions of the Commission,[110] will be emphasized in a particular comparative proceeding.[111] For example, although a license applicant's level of minority stock ownership and participation had previously been declared a relevant consideration in choosing among competing applicants,[112] in a later case involving two equally qualified applicants, the Commission's Review Board concluded that local residence and civic participation, a criterion usually only marginally important,[113] outweighed minority ownership.[114] As a result of such changes, opponents of the selection of licensees on the basis of probable service in the public interest contend that this type of merit selection becomes an arbitrary decision.[115] Furthermore, according to the critics, because of the lack of clear guidelines concerning, for example, requirements for programs on public issues, the Commission has been less inclined to schedule a hearing in response to a petition to deny to determine whether or not a licensee is serving in the public interest.[116] Despite these criticisms, the FCC has retained broad authority to determine the components of the public interest standard.

II. Section 504 of the Rehabilitation Act and the FCC's Responsibilities Under the Statute

Section 504 of the Rehabilitation Act, which prohibits discrimination against otherwise qualified handicapped persons, applies to any program or activity receiving federal funds and to any activity conducted by any executive agency.[117] The Supreme Court interpreted section 504 in *Southeastern Community College v. Davis*,[118] holding that the purpose of the statute is to prohibit discrimination against a person who meets all the requirements of a program in spite of a handicap.[119] In *Davis*, the Court found that the school had not violated section 504 by denying a deaf applicant admission to the college's nursing program.[120] In so ruling, the Court upheld the school's determination that the

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[110] Sharp, *Lotteries at the FCC: The Prelude to Experience*, 35 Ad. L. Rev. 45, 46 n.9 (1983). [hereinafter cited as Sharp].

[111] *See* Grand Broadcasting Co., 36 F.C.C. 225 (1964) for an example of how the Commissioners themselves have difficulty weighing factors to decide which applicant will best serve the public interest. The comparative hearing process is lengthy and expensive. Wunder, *New Service Licensing Alternatives*, 35 Ad. L. Rev., 61, 62 (1983). The average hearing takes between nine and thirteen months and the cost of legal representation alone averages $100,000. *Id.*

[112] TV9, Inc. v. Federal Communications Comm'n., 495 F.2d 929, 937-38 (D.C. Cir. 1973), *rehearing and rehearing en banc denied* (1974), *cert. denied* 419 U.S. 986 (1974). In *TV9*, the Review Board accorded no merit for black ownership or participation in a comparative broadcast proceeding, asserting that the Communications Act is color blind. *Id.* at 935-36. The court of appeals, reviewing the FCC's licensing decision, rejected this argument. *Id.* at 936. The court found that minority stock ownership was a relevant factor in choosing among applicants because it indicated broader representation of the local community and practicable service to the public in a city in which the minority group was not otherwise represented in the ownership of mass communications media. *Id.* at 937 & n.26

[113] *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d at 395-96.

[114] Franklin, *supra* note 5, at 768 (citing Waters Broadcasting Corp. 50 R.R. 2d 1110 (1982)).

[115] Scott, *supra* note 103, at 42.

[116] Chamberlin, *supra* note 90, at 1079.

[117] 29 U.S.C. § 794 (Supp. V 1980).

[118] 442 U.S. 397 (1979).

[119] *Id.* at 406.

[120] *Id.* at 414.

applicant did not qualify for the program because of her hearing disability.[121] Looking closely at the language of the statute, the *Davis* Court found that section 504 requires only that an "otherwise qualified" handicapped individual not be excluded solely because of his handicap.[122] An otherwise qualified person, the Court stated, is one who is able to meet all of a program's requirements in spite of his or her handicap.[123] The Court determined that the deaf applicant was not otherwise qualified because the ability to hear was a legitimate physical qualification for the nursing program.[124] According to the Court, the ability to hear might be necessary to insure patient safety during the clinical part of the program and was conceivably essential in performing many of the duties of a registered nurse.[125] Finally, the Court found that review of the language, history and purpose of section 504 did not reveal any congressional intent to impose an affirmative action obligation on all recipients of federal funds.[126] As a result of the Court's reasoning in *Davis*, a handicapped person must prove that he or she meets all the requirements of a program to prevail in a suit alleging a violation of section 504.[127] Under this statutory interpretation, public television stations would not need to make accommodations for the deaf if hearing were an essential qualification for access to television. Because captioning technology exists, however, the hearing impaired meet the requirements of the activity, television viewing, and are therefore persons otherwise qualified to enjoy the benefits of television.

The Department of Justice is responsible for enforcing and coordinating the implementation of section 504.[128] This provision applies to noncommercial broadcast stations because they receive federal financial assistance.[129] Section 504 also applies to

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[121] *Id.* at 402, 414.

[122] *Id.* at 405.

[123] *Id.* at 406. Legitimate physical qualifications may be essential for participation in a particular program, the Court explained. *Id.* at 407.

[124] *Id.* at 407.

[125] *Id.*

[126] *Id.* at 411. The Court did note, however, that the line between unlawful discrimination and a lawful refusal to extend affirmative action may not always be clear. *Id.* at 412. Technological advances may enable attainment of goals without imposing undue financial burdens. *Id.*

[127] *Id.* at 402-14.

[128] Executive Order No. 12,250 transferred enforcement responsibility to the Department of Justice. 45 Fed. Reg. 72,995 (1980). Section 504 was patterned after Title VI and no agency was originally designated to enforce it. Community Television of Southern California v. Gottfried, 459 U.S. 498, 509 (1983). In 1976, the Department of Health, Education and Welfare was designated. *See* Exec. Order No. 11,914, 45 C.F.R. Part 85, App. A, at 374. At first, the HEW did not promulgate any regulations to implement section 504, relying on its plain language. Southeastern Community College v. Davis, 442 U.S. 397, 404 n.4 (1979). See *supra* note 18 for text of section 504. No regulations have yet been adopted concerning captioning of television programs.

[129] The sources of funding for public broadcasting in 1982 were: Corporation for Public Broadcasting ("CPB") — 20.5%, state governments — 18.9%, subscribers — 16.7%, state colleges and universities — 10.7%, business — 10.7%, local governments — 5.1%, other — 7%. "Final Report of the Temporary Commission on Alternative Financing for Public Telecommunications", fig.1. The CPB consists of a 15 member Board of Directors, appointed by the President, subject to confirmation by the Senate. No more than eight members may be from the same political party. Community-Service Broadcasting of Mid-America v. FCC, 593 F.2d 1102, 1107 (D.C. Cir. 1978). Stations receiving funds from CPB must meet all the licensing requirements of the FCC applicable to noncommercial stations and must be owned and operated by a public agency or nonprofit private foundation, corporation or association. *Id.* at 1107 n.10. CPB duties are to disburse funds to production entities and noncommercial broadcast stations, to arrange for an interconnection system capable of distributing programs, to conduct research and demonstrations, and to encourage creation of new noncommercial stations. *Id.* at 1107.

activities conducted by executive agencies.[130] In an effort to meet its responsibilities, the Department has promulgated rules stating that each agency must "issue a regulation to implement section 504 with respect to the programs and activities to which it provides assistance."[131] These rules define an agency as any federal department or agency empowered to extend financial assistance.[132] Since the FCC does not provide financial assistance,[133] it does not fall within this definition.[134] The FCC has determined, therefore, that Department of Justice rules do not apply to the Commission and has not promulgated regulations to enforce section 504.[135]

Although the FCC is only authorized to enforce provisions of the Communications Act,[136] and not those of the Rehabilitation Act, the Commission may have an obligation to consider the policies inherent in other legislation. In *McLean Trucking Co. v. United States*,[137] although the Court found the ICC had not abused its discretion when it determined that a consolidation of motor carriers which might have anticompetitive effects was within the public interest,[138] the Court stated that agencies should consider policies embodied in relevant legislation. The Supreme Court in *McLean* held that in executing the policies embodied in its enabling legislation, an agency may be faced with overlapping or inconsistent policies contained in other legislation that it cannot ignore.[139] The Court stated that although an agency may not be authorized to enforce an act, it is not authorized to ignore it either.[140]

Subsequent to the *McLean* decision, the Supreme Court in *Denver Rio Grande Western Railroad Co. v. United States*,[141] again addressed the ICC's responsibility to consider the policies expressed in legislation other than its enabling act.[142] The Court stated that Congress' use of the broad term "public interest" in the Interstate Commerce Act revealed an intent that the ICC not ignore facts indicating that transactions under its consideration for approval might exceed limitations imposed by other relevant laws.[143] According to the Court, common sense and sound administrative policy supported this conclusion.[144] Moreover, the Court noted, the Clayton Act[145] expressly authorized the ICC to enforce compliance with the antitrust laws where applicable to common carriers.[146] The Court's holding in *Denver* supported the proposition that agencies empowered under

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[130] 29 U.S.C. § 794 (Supp V. 1980).

[131] 28 C.F.R. § 41.4(a) (1982).

[132] 28 C.F.R. § 41.3(c) (1982).

[133] License Renewal Applications, (Petition for Reconsideration), 72 F.C.C.2d 273, 278 (1979).

[134] Licenses are not federal financial assistance. *See* Gottfried v. FCC, 655 F.2d 297, 313-14 (D.C. Cir. 1981).

[135] *Id.*

[136] 47 U.S.C. § 151 (1976).

[137] 321 U.S. 67 (1944).

[138] *Id.* at 87-88. The Court noted that pursuant to Section 5(11) of the Interstate Commerce Act, carriers participating in an approved consolidation are exempt from the restraints of antitrust laws insofar as necessary to enable them to effect the approved transaction. *Id.* at 76.

[139] *Id.* at 80.

[140] *Id.* at 86.

[141] 387 U.S. 485 (1967).

[142] *Id.* at 493.

[143] *Id.* at 492.

[144] *Id.*

[145] 15 U.S.C. § 21(11) (1982).

[146] *Denver*, 387 U.S. at 493 n.6.

a "public interest" standard should consider policies expressed in legislation relevant to their statutory purpose.

Following the reasoning of the *McLean* and *Denver* decisions, the FCC has concluded that it has a duty to consider whether federal laws other than the Communications Act have been violated when evaluating applicants for licenses.[147] Indeed, the FCC stated that it would take appropriate action if another agency found a licensee violated section 504 of the Rehabilitation Act.[148] The FCC has determined that such violations reflect on an applicant's character qualifications and therefore may be indicative of future broadcast performance.[149] Violations of federal law, however, are considered only to the extent that the violations bear on matters entrusted to the Commission.[150] Relevant considerations include whether the violation was broadcast related, whether it was recurrent, and whether the acts were willful or inadvertent.[151] Although the FCC is only empowered to enforce the Communications Act, the FCC has therefore recognized the need to consider the policies embodied in other legislation. The Commission, however, refused to consider whether licensees seeking renewals had violated the policy prohibiting discrimination against the handicapped found in section 504 of the Rehabilitation Act,[152] thus precipitating the suit in *Community Television*.

III. *Community Television of Southern California v. Gottfried*

A. *The Majority Opinion*

In a seven-to-two decision, the Supreme Court in *Community Television of Southern California v. Gottfried*[153] held that section 504 of the Rehabilitation Act does not require the FCC to review a public television station's renewal application under a different standard than the standard that applies to a commercial station.[154] The Court began its discussion in *Community Television* by recognizing that there was no question that the public interest would be served by making television broadcasting more available to the hearing impaired.[155] Noting that none of the parties suggested that a licensee may simply refuse to

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[147] Report on Uniform Policy as to Violation by Applicants of Laws of United States, 42 F.C.C.2d 399, 401 (1951). A violation of federal law is considered a pertinent part of the past history of an applicant. *Id.* at 400. This consideration relates to the character qualification in section 308 of the Communications Act. *Id.* By considering violations of other statutes when evaluating license applications, the FCC does not encroach upon the administrative and enforcement jurisdictions of other governmental agencies . *Id.* at 401. The FCC is concerned with these violations only insofar as they bear on matters entrusted to the Commission. *Id.* Thus, the FCC considers such violations on a case-by-case basis. *Id.* Even if no suit has been filed, or if one has been filed but not been heard or finally adjudicated, the Commission may consider and evaluate the questions raised and facts involved. *Id.* at 403.

[148] License Renewal Applications, 69 F.C.C.2d 451, 459 (1978).

[149] In Re Application of Gross Telecasting, Inc., 92 F.C.C.2d 204, 240 (1982).

[150] *See supra* note 147.

[151] *Gross Telecasting*, 92 F.C.C.2d at 240. In *Gross*, the Commission determined that an unfair labor practice in violation of section 8(a)(3) of the National Labor Relations Act was not a relevant factor because the misconduct was remote in time, an isolated occurrence, and settled prior to adjudication on the merits. *Id.* at 240-41.

[152] See License Renewal Applications, 69 F.C.C.2d. at 459.

[153] 459 U.S. 498 (1983). Joining in the opinion written by Stevens, J. were Burger, C.J., and White, Blackmun, Powell, Rehnquist, and O'Connor, J.J.

[154] *Id.* at 500.

[155] *Id.* at 508.

consider the needs of the hearing impaired, the Court then moved directly into a discussion of whether the Rehabilitation Act was intended to create any additional enforcement obligations on the FCC.[156]

Examining the legislative history of the Rehabilitation Act, the Court found no evidence that Congress intended, by enacting the statute, to impose new enforcement obligations on the FCC or intended to alter the Commission's standard for reviewing the programming decisions of public television licensees.[157] The Court reasoned that the general words "public interest" in the Communications Act were not sufficient to imply such duties.[158] While the FCC, as an agency required to promote the public interest, may have an administrative duty to consider the needs of the handicapped, such as the hearing impaired, the Court noted that the Rehabilitation Act does not impose any regulatory standards on the FCC.[159] According to the Court, the FCC is not required to consider applicants for license renewals under the standard set forth in section 504.[160] The *Community Television* Court found that under the plain words of the statute, the enforcement of section 504 was delegated to those agencies administering federal financial assistance.[161] The Court concluded that because the FCC is not a funding agency, the Commission has no responsibility to enforce section 504.[162] Absent an express direction in the Rehabilitation Act, the Court stated that it was unwilling to assume that Congress expected the FCC to take original jurisdiction over the processing of charges that a licensee had violated the Act.[163] The Court cautioned, however, that once a violation was found by the proper agency or court, the FCC would be obligated to consider whether such a violation had any relevance in its renewal proceeding.[164]

Having established that the Rehabilitation Act imposed no additional enforcement obligations on the FCC,[165] the Court then considered whether public television stations, as recipients of federal aid, have a duty to comply with the Rehabilitation Act and whether this duty required the FCC to evaluate a public station's service to the handicapped by a stricter standard than applied to commercial stations.[166] The Court found that the noncommercial stations' duty to comply with the Act did not obligate the FCC to impose a more exacting standard than the one used to consider license renewals for commercial stations.[167] The Court stated that the public interest in having all stations consider the needs of the hearing impaired is equally strong.[168] In addition, the Court emphasized that it was unfair to criticize any licensee, whether public or commercial, for failing to satisfy

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[156] *Id.* at 508-09.

[157] *Id.* at 509-10. The Court dismissed the contention that McLean Trucking Co. v. United States, 321 U.S. 67 (1944) required the FCC to measure proposals for license renewals of public television stations by section 504 standards. *Id.* at 509 n.14.

[158] *Id.*

[159] *Id.*

[160] *Id.* See *supra* text accompanying notes 117-27 for a discussion of the standards in section 504 of the Rehabilitation Act..

[161] *Id.* at 509.

[162] *Id.*

[163] *Id.* at 510.

[164] *Id.*

[165] *Id.* at 509-10.

[166] *Id.* at 511.

[167] *Id.*

[168] *Id.*

requirements of which it had no notice.[169] According to the Court, such changes in licensing policies should be made prospectively.[170] The Court also stated that implementation of new industry-wide policies through rulemaking is preferred to the uneven application of policies that results when isolated license renewal proceedings are used.[171]

The *Community Television* Court then noted that its decision did not foreclose the imposition of stricter standards on public broadcasting stations by other means.[172] The Court recognized that a federal agency providing funds to public broadcast stations could establish conditions on its grants, subjecting the station to more stringent requirements than does the FCC.[173] Alternatively, the Court stated that regulations which imposed special obligations on public stations could be promulgated under the Rehabilitation Act.[174] The FCC itself, the Court stated, could establish a policy requiring that certain types of programming be universally provided.[175] Such a policy, the Court also recognized, could require certain stations to take more responsibility for developing the necessary programming.[176] The Court stated, however, that because such differential standards had not been created, the FCC did not abuse its discretion in determining that the public interest standard in the Communications Act does not require the Commission to impose a greater obligation on public licensees to provide programming for the hearing impaired than it does on commercial stations.[177] Consequently, the majority concluded that the Court of Appeals' decision that public licensees were subject to stricter standards was in error.[178]

B. *The Dissenting Opinion*

Justice Marshall wrote a dissenting opinion in *Community Television* in which Justice Brennan joined.[179] The dissent began by stating that in granting the renewal of the public station's license, the FCC refused to consider whether the station had violated the Rehabilitation Act.[180] According to the dissent, the majority's decision that the FCC did not abuse its discretion in refusing to consider this possible violation was unsupported by both precedent and any sound view of administrative process.[181] The dissent cited a line of Supreme Court decisions suggesting that an agency, in assessing the "public interest", cannot focus solely on the legislation that defines its duties.[182] According to the cited opinions, although the meaning of the phrase "public interest" is to be derived from the purposes of the statute that defines an agency's responsibilities, the agency may not ignore other relevant laws if the administrative process is to serve congressional objectives

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[169] *Id.*
[170] *Id.* at n.18.
[171] *Id.* at 511.
[172] *Id.* at 511-12.
[173] *Id.* at 512.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.* at 513.
[180] *Id.*
[181] *Id.*
[182] *Id.* at 513-17. The cases cited were Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942); McLean Trucking Co. v. United States, 321 U.S. 67 (1944); Denver & Rio Grande Western Railroad Co. v. United States, 387 U.S. 485 (1967).

adequately.[183] The dissent stated that in *McLean Trucking Co. v. United States*,[184] the Court found that although the ICC had no power to enforce the Sherman Act, it could not ignore antitrust legislation in deciding whether a transaction would serve the public interest.[185] The *Community Television* dissent noted that reasoning similar to the reasoning in *McLean* was expressed in *Denver & Rio Grande Western Railroad Co. v. United States*.[186] In *Denver*, the Court found that the broad term "public interest" indicates that an agency cannot close its eyes to the requirements of other relevant legislation when making determinations under its own enabling statute.[187] The dissent also discussed *Southern Steamship Co. v. NLRB*,[188] in which the Court, while acknowledging the breadth of the National Labor Relations Board's discretion, concluded that the Board could not ignore pertinent federal laws or other equally important congressional objectives.[189] These decisions, the dissent noted, established that an agency may not disregard other federal statutes when implementing its own regulatory scheme.[190] The dissent maintained that an agency need not conclusively determine what other statutes require or forbid in order to take possible violations of such acts into account in making decisions under its own enabling statute.[191] Prior Supreme Court opinions requiring administrative agencies to consider other relevant statutes recognize, the dissent stated, that the objectives of Congress would not be served if agencies could ignore statutes they were not specifically authorized to enforce.[192]

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[183] *Community Television* at 513-17.

[184] 321 U.S. 67 (1944). In *McLean*, the Supreme Court found that Congress had delegated to the ICC the task of enforcing the Interstate Commerce Act and the policies expressed in it. *Id.* at 79. But in executing these policies, the Court noted, the agency may be faced with overlapping and perhaps inconsistent policies in legislation enacted at other times. *Id.* at 80. According to the Court, although the agency does not have the duty or authority to execute numerous other laws, it cannot ignore them. *Id.* at 79-80. In *McLean*, the Court held that the ICC had not abused its discretion when it determined that a proposed consolidation of motor carriers was within the public's interest, despite the anticompetitive effects of the merger. *Id.* at 85-88.

[185] Community Television of Southern California v. Gottfried, 459 U.S. at 514.

[186] 387 U.S. 485 (1967).

[187] *Community Television*, 459 U.S. at 515. The Court in *Denver* held that the ICC must consider anticompetitive issues under the public interest standard of the Interstate Commerce Act. *Denver*, 387 U.S. at 501. In addition, the Court stated that the Clayton Act, 15 U.S.C. § 21, imposes a positive duty on the ICC to enforce that Act's provisions. *Id.* at 502. In *Denver*, the Court found that the ICC was required, therefore, to consider the anticompetitive effect of a proposed stock issuance. *Id.* at 492.

[188] 316 U.S. 31 (1942).

[189] *Community Television*, 459 U.S. at 515-16. The dissent quoted *Southern Steamship*: " 'the Board has not been commissioned to effectuate the policies of the National Labor Relations Act so singlemindedly that it may wholly ignore other equally important Congressional objectives.' " *Southern Steamship*, 316 U.S. at 47. The Court in *Southern Steamship* held that the Board exceeded its statutory authority under the National Labor Relations Act when it ordered the reinstatement of striking seamen without considering whether the strike had violated federal statutes proscribing mutiny. *Id.* at 46-48.

[190] *Community Television*, 459 U.S. at 513, 516 (1983).

[191] *Id.* at 516

[192] *Id.* In support of this proposition, the dissent quoted: " 'No agency entrusted with determinations of public convenience and necessity is an island. It fits within a national system of regulatory control of industry.' " Palisades Citizens Association, Inc. v. CAB, 420 F.2d 188, 191 (D.C. Cir. 1969). The dissent also noted that the Court in *Southern Steamship* stated, " '[f]requently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another.' " 316 U.S. at 47.

Turning to a consideration of "public interest" under the Communications Act, the dissent maintained that the purpose of the Act was to make rapid communication available to all the people of the United States.[193] The dissent noted that the Supreme Court in *NAACP v. FCC*[194] had stated that the FCC has an obligation to insure that programming reflects the tastes and viewpoints of minority groups.[195] In carrying out this duty, the dissent argued, the FCC should also have an obligation to consider whether a licensee has denied meaningful programming to a sizeable minority group such as the hearing impaired.[196] According to the dissent, therefore, the FCC should at least have considered whether the public television station had violated the Rehabilitation Act.[197] The objectives of Congress, the dissent concluded, would not be served if an administrative agency, such as the FCC in the matter before it, were permitted to disregard any statute it is not specifically authorized to enforce.[198]

IV. The Public Interest Standard in the Communications Act

In *Community Television*, the Court held that the FCC does not abuse its discretion in determining whether a public station served the public interest without considering whether the station had complied with its obligations under the Rehabilitation Act. This section of the casenote will analyze the Court's reasoning in *Community Television*. It will be divided into three parts. The first part will address the interpretation of the public interest standard. It will be submitted that the *Community Television* Court failed to consider the plain language and intent of the Communications Act and the FCC's failure to fulfill its duty to include all the people of the United States in its determination of the public interest. The second part will discuss the need for agencies to consider policies embodied in legislation that they are not empowered to enforce. It will be demonstrated that the Court failed to properly apply the reasoning of *McLean* to the issue before it. Finally, it will be suggested that Congress needs to review the provisions of the Communications Act and mandate that broadcast licensees provide programming accessible to all segments of the population, including the hearing impaired, in view of the enlarged role of telecommunications in today's society.

A. *The Public in the Public Interest Standard*

The Communications Act provides that the FCC may approve an application for a broadcasting license whenever it finds that approval of the license would serve the public interest.[199] The courts have found that Congress gave the Commission broad discretionary authority to determine the components of the public interest criterion in accord with the purposes of the Communications Act and have traditionally shown great deference to the FCC's interpretation of the public interest standard.[200] This broad discretion permits, but does not require, the Commission to incorporate into the public interest standard the policies expressed in federal legislation other than the Communications Act.[201]

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[193] Community Television of Southern California v. Gottfried, 459 U.S. at 517.
[194] 425 U.S. 662 (1976).
[195] *Id.* at 670 n.7.
[196] *Community Television*, 459 U.S. at 517-18.
[197] *Id.* at 513, 518.
[198] *Id.* at 516.
[199] 47 U.S.C. § 307(d) (1976).
[200] *See supra* notes 55-65, 77-81 and accompanying text.
[201] *See supra* notes 82-87 and accompanying text.

In *Community Television*, the Court demonstrated the extent of this deference with its willingness to affirm the FCC's discretion to ignore what the Court conceded was an important federal interest in providing opportunities for the handicapped when determining whether a licensee acted in the public interest.[202] The Court supported its position by emphasizing that under the terms of the Rehabilitation Act, the Commission is not empowered to enforce section 504 because the FCC is not a funding agency.[203] By stressing that the FCC had no obligation to enforce the Rehabilitation Act, the Court avoided the question whether the FCC was fulfilling its administrative duty under the Communications Act to consider the needs of all people in the community, including the hearing impaired.[204]

The majority's deference to the FCC's interpretation of the public interest standard fails to consider the critical role that television often plays in the lives of the hearing impaired and the limited nature of the FCC's actions thus far to insure this population access to the benefits of television.[205] As the dissent noted, the deaf represent a sizeable minority group in the United States and the Court has found that the Commission has an obligation to assure meaningful programming to minorities.[206] An estimated 8.5 to 20 million hearing impaired persons need captioned programming in order to receive news and entertainment material through television.[207] For many of these people, television is the only source through which they can receive current news.[208] Because of their hearing impairment, television is the sole electronic communications medium which presently has the ability to provide the visual component necessary for them to enjoy the benefits of telecommunications.

Although the FCC has taken some actions toward providing programming for the deaf, the Commission has neglected to fulfill its responsibility for insuring that such programming is actually provided. The FCC has chosen to address this issue by encouraging individual licensees to experiment with ways to serve the hearing impaired rather than by promulgating rules and regulations mandating the telecast of programs accessible to the deaf.[209] In 1970, for example, the FCC issued a notice to all television licensees describing the special needs of the hearing impaired and suggesting ways television could serve this population.[210] Subsequently, in recognition of the vital role television plays for the hearing impaired, the Commission adopted a rule which requires television licensees to broadcast emergency information visually.[211] Despite this recognition, the FCC, and the Court in *Community Television*, failed to consider that the hearing impaired would probably not be watching television when emergency information is broadcast if captioned programming were seldom accessible to them.

Further evidence of the FCC's inadequate attention to the deaf component of the American public is found in the Commission's response to the passage of the Rehabilitation Act. The FCC did not take the initiative and establish guidelines for captioning, a

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[202] 459 U.S. at 508-09.
[203] *Id.* at 509-10.
[204] *Id.* at 509 n.14.
[205] *See infra* notes 207-15 and accompanying text.
[206] *Id.* at 517.
[207] *Id.* at 508 n.12.
[208] *Id.*
[209] License Renewal Applications, 69 F.C.C.2d 451, 454-55 (1978).
[210] *Id.* at 454.
[211] *Id.* at 455.

technology within the Commission's area of expertise.[212] Instead the FCC decided to wait for the Department of Education, as the agency responsible for coordinating the implementation of section 504, to develop guidelines concerning the obligations of public broadcasters to the hearing impaired before attempting to assess compliance with the statute.[213] Recently, the Department of Education abandoned its rulemaking efforts concerning television captioning, preferring to enforce section 504 through adjudication of complaints and by conditioning grant awards on compliance with the statute.[214] The FCC, however, has not yet taken any action in response to the Department of Education's decision, despite the Commission's prior statement that it would consider rulemaking if none of the projects on the captioning of television programs succeeded in insuring that the hearing impaired have access to the benefits of television.[215] As a result of this reluctance to take positive action for the hearing impaired, the FCC has failed to execute the purposes of its regulatory statute affecting a substantial part of the public who, the Commission recognized, could benefit greatly from television programming.

The majority's deference to the FCC's judgment in determining the components of the public interest standard and in deciding how to insure that its licensees serve all segments of the population, although based on well-established precedent, is no longer justified. In addition to the Commission's failure to adequately consider groups such as the hearing impaired, the Commission's recent actions to further its program to deregulate the communications industry result in an undesirable decrease in the public's ability to voice opinions on what constitutes the public's interest and to participate in the FCC's supervision of its licensees.[216] The FCC, for example, recently adopted new license renewal procedures that make it more difficult for the public to affect the license renewal process.[217] Under the new rules, all commercial radio licensees and ninety-five percent of television and noncommercial radio licensees will file a simplified renewal application ("SRA"), consisting of five basic questions concerning the identity of the licensee and whether the station has complied with all of the Commission's filing requirements.[218] The

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[212] Note, *Television and the Hearing Impaired*, 34 FED. COMM. L.J. 93, 155 (1982).

[213] Gottfried v. FCC, 655 F.2d 297, 303 n.22, 304 (D.C. Cir. 1981). The Department of Education was established on May 4, 1980. *Id.* at 303 n.22. It assumed responsibility for administration of programs providing financial assistance for the production of educational television to be shown on noncommercial stations. *Id.* The HEW study group designated to prepare guidelines for compliance with section 504 was also transferred to the department. *Id.* The Department of Education issued a notice of intent to develop regulations on January 19, 1981. Nondiscrimination on the Basis of Handicap, 46 Fed. Reg. 4954 (1981).

[214] Greater Los Angeles Council on Deafness v. Community Television of Southern California, 719 F.2d 1017, 1022 (9th Cir. 1983). The court of appeals affirmed the department's discretion not to promulgate rules.

[215] License Renewal Applications (Petition for Reconsideration), 72 F.C.C.2d 273, 281 (1979).

[216] *See infra* notes 217-24 and accompanying text.

[217] Radio Broadcast Services, 46 Fed. Reg. 26236 (1981).

[218] *Id.* Question one identifies the licensee and its location. *Id.* at 26238. Question two asks whether the licensee has filed its nondiscrimination in employment and current ownership forms. *Id.* Question three asks if the licensee remains in compliance with rules relating to interests of aliens and foreign governments in broadcast licenses. *Id.* Question four asks whether the applicant has been subject to an adverse decree by a court or administrative body since its last renewal application. *Id.* Question five asks whether the licensee has placed all required information in its public inspection file. *Id.* The SRA, a brief one-page form, is known as "postcard renewal." Chamberlin, *supra* note 90, at 1105. Five percent of the stations who file for license renewal will be selected at random to complete a longer audit form. 46 Fed. Reg. at 26236.

new procedures also provide that the records of stations who file SRAs will be available only at local stations, when previously all records could be obtained at the Commission's headquarters in Washington, D.C.[219] A number of citizen groups have persuasively criticized the SRAs. These groups argue that curtailed access to station files at the FCC headquarters hinders the ability of groups and individuals to monitor station performance.[220] Critics also contend that the SRAs do not provide sufficient information from which the Commission can reach the required statutory finding that a grant of renewal will serve the public interest.[221]

In addition to the adoption of the SRAs, the FCC has proposed the elimination of the statutory basis for the fairness doctrine.[222] This doctrine, which has its source both in the Communications Act and in FCC regulations, currently requires that broadcasters provide equal time for candidates for public office, reasonable coverage of controversial issues, and a reasonable opportunity for the presentation of points of view which differ from those of the station.[223] If Congress enacts the proposal, it will eliminate the FCC's statutory mandate to impose the equal time requirement on its licensees.[224] The current chairman of the FCC supports the abolition of the fairness doctrine and other rules relating to programming decisions in favor of adopting a "marketplace" approach to broadcast regulation.[225] Under the proposed marketplace policy, the Commission would eliminate many of its regulatory requirements and defer completely to a broadcaster's judgment about how to best compete for viewers and listeners.[226] Proponents of this approach reason that competition for an audience is the best way to serve the interests of the public.[227]

The establishment of policies forwarding the marketplace approach, however, further erodes the FCC's ability to enforce the purposes of the Communications Act and does not benefit the public as a whole. Reliance on the dynamics of the marketplace to assure television service to all segments of the population is unrealistic. Currently, broadcasters have not shown a willingness to accommodate the needs of the hearing impaired.[228] Commercial stations, interested in maximizing profits, are unwilling to invest in the technology necessary to serve the hearing impaired absent FCC adoption of a standard technology for captioning.[229] The FCC, on the other hand, has been reluctant to

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[219] *Id.* at 26239.

[220] *Id.*

[221] *Id.* at 26239. The Commission, however, asserts that the SRA is a procedural rather than a substantive change and that the FCC's adoption of the short form will not decrease its ability to make the public interest finding. *Id.* at 26240.

[222] 48 Fed. Reg. 26472 (1983). The FCC adopted a proposal to repeal section 315 of the Communications Act. *Id.* at 26473. Section 315 requires broadcasting stations to provide equal broadcast time to all legally qualified candidates for public office. 47 U.S.C. § 315 (1976).

[223] 48 Fed. Reg. at 26474.

[224] *Id.* at 26473. The fairness doctrine also finds authority in the public interest standard generally. Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 296 n.34 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

[225] Fowler, *supra* note 103, at 214-15.

[226] *Id.* at 214.

[227] *Id.* Supporters of the marketplace approach further propose elimination of comparative licensing hearings and the selection of licensees by lottery. *See* Wunder, *New Service Licensing Alternatives*, 35 AD. L. REV. 61, 63-64 (1983).

[228] Note, *Television and the Hearing Impaired*, 34 FED. COMM. L.J. 93, 155-56 (1982).

[229] *Id.* at 121, 155-56.

promulgate regulations beneficial to the deaf which will cost its licensees money.[230] Because only the FCC has the technical knowledge and the industry-wide authority necessary to establish a standard technology for captioning, the Commission's failure to act virtually assures no increase in the provision of captioned programming. Reduced regulation of broadcasters' choice of the type of programming they will offer is therefore unlikely to result in service to groups such as the hearing impaired.

While deregulation reduces costs to both the industry and the FCC, it does not address the mandate of the Communications Act that the FCC and broadcasters assure the benefits of the use of a valuable resource to all people.[231] Considering the value of a broadcasting license, requiring licensees to address the needs of everyone is more than reasonable. When a station obtains a license to operate a broadcasting station, it acquires a valuable commodity, and in a real sense, a government subsidy.[232] The FCC issues licenses free of charge, even though market value of a single license may reach one hundred million dollars.[233] By pursuing its policy of deregulation, the FCC abrogates its duty to determine that in return for the grant of this valuable license, a station is fulfilling its obligation to serve in the public interest. Instead, the Commission is doling out a lucrative government benefit without insuring that its recipients are advancing the purposes of the regulatory scheme.

The *Community Television* decision lends support to the FCC's current policy of deregulation by acknowledging the broad discretionary power of the FCC to determine the "public interest" standard, even to the point of ignoring civil rights legislation for the handicapped. In *Community Television*, the Court ignored the reality that the FCC has not fulfilled its statutory duties toward the hearing impaired under the Communications Act, and that, in its present disposition toward deregulation, the FCC is unlikely to promulgate any regulations to assure this population's access to television. As a result of the FCC's nonaction, the hearing impaired are effectively excluded from the public in the public interest standard of the Communications Act, an outcome that can hardly have been Congress' intent when enacting the Communications Act.[234] The courts, therefore, can no longer justifiably defer to the FCC's decisions because the FCC is proceeding on a course which is not in the interest of the public at large and which will not allow it to fulfill its obligations under the Communications Act.

B. *An Agency's Duty to Consider Policies Expressed in Relevant Federal Legislation*

Prior to the Court's decision in *Community Television*, the Supreme Court had established the principle that an agency executing the policies embodied in a regulatory statute that defines its responsibilities in terms of "public interest" may not ignore the policies set forth in other relevant legislation.[235] This principle was reflected in the Court's recogni-

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[230] *Id.* at 126-29.

[231] 47 U.S.C. § 151 (1976).

[232] *See* Scott, *supra* note 103, at 41-42.

[233] Sharp, *supra* note 110, at 45.

[234] Evidence of Congress' awareness of the importance of telecommunications to the hearing impaired is found in the Telecommunications for Disabled Act of 1982, which is "designed to promote access to telephone service by the hearing impaired." Access to Telecommunications Equipment, 93 F.C.C.2d 1311 (1984). The Act directed the FCC to promulgate rules to implement its provisions. *Id.*

[235] *See supra* notes 137-46 and accompanying text.

tion that congressional objectives in passing laws would not be effectively advanced if agencies were permitted to ignore the policies incorporated in statutes that they were not specifically empowered to enforce.[236] Under the principle, agencies were required only to consider the relationship of the policies underlying the other legislation to their own administrative decisions, and were not expected to determine what the relevant statute prohibited or allowed.[237] This accommodation recognized that agencies entrusted by Congress to determine the public interest as it applies to a particular industry are part of a national system of regulation and that federal agencies are not isolated entities.[238] Even though under this principle agencies did not have to mount separate enforcement efforts to promote all national policies, the accommodation principle succeeded in forcing agencies to consider and promote policies consistent with, and complementary to, their enabling statutes. In *Community Television*, the Court altered this established principle when it held that the FCC need consider the possible relevance of federal legislation other than the Communications Act only if an applicant has been found guilty of violating the other statute.[239] In so holding, the Court ignored both precedent and the exigencies of effective implementation of congressional policy through administrative agencies.

The *Community Television* Court erred initially by framing the issue of the matter before it as whether the FCC had to enforce public television's obligations under the Rehabilitation Act toward the hearing impaired in a license renewal proceeding.[240] As the dissent persuasively asserted, the real issue before the Court was whether the FCC should have given at least some consideration to the national policy expressed in the Rehabilitation Act when determining whether its licensees were fulfilling their obligation to operate in the public interest.[241] As a result of the majority's framing of the issue, however, the Court misapplied its prior decision in *McLean* to the situation presented in *Community Television* and emphasized the wrong aspect of the *McLean* opinion.[242]

The majority in *Community Television* stated that in *McLean*, the Court had determined that even though an agency authorized to regulate a particular industry using a public interest standard could not ignore policies expressed in other statutes, the agency in question did not have the authority to execute other laws.[243] Moreover, according to the majority, *McLean* established that when considering the policies contained in other relevant laws, an agency need not evaluate the proposals under consideration using the standards embodied in that other legislation.[244] Based on these observations, the *Community Television* Court concluded that although the FCC had an administrative duty to consider the needs of the hearing impaired, it was not required to evaluate license

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[236] Community Television of Southern California v. Gottfried, 459 U.S. at 516.

[237] *Id.*

[238] Palisades Citizens Association, Inc. v. CAB, 420 F.2d 188,191 (D.C. Cir. 1969).

[239] *Community Television* at 509-10.

[240] *Id.* at 509.

[241] *Id.* at 515 n.2.

[242] *See id.* at 509 n.14.

[243] *Id.*

[244] *Id.* In *McLean*, the discussion of standards resulted from a provision in the Interstate Commerce Act that exempted certain consolidations of carriers from the antitrust laws. 321 U.S. 83-85 (1944). One issue in *McLean*, therefore, was whether the ICC had to measure applications for this exemption by the standards established under the Sherman Act. *Id.* at 85. The Court found that the ICC did not have to apply the policies of antitrust law so strictly as to prevent flexibility in determining what was best for transportation. *Id.* at 86.

renewal applications by the standards enunciated in section 504 of the Rehabilitation Act.[245] The Court, thus, made only cursory reference to the first principle in the *McLean* opinion concerning the duty of agencies to consider legislation pertinent to its administrative decisions and focused on the second issue concerning the standards by which an agency should weigh the requirements of these other laws.[246] The majority's emphasis on the standards question was inappropriate, particularly considering that the FCC defended its position in *Community Television* partly on the basis that the agency responsible for enforcing section 504 of the Rehabilitation Act had not promulgated any standards by which it could evaluate a station's service to the hearing impaired.[247]

The dissent, on the other hand, correctly recognized that the applicable principle in *McLean* is that an agency, when assessing the "public interest" in relation to its regulatory scheme, cannot ignore other relevant statutes.[248] As the dissent noted, the *McLean* decision clearly stated that although the ICC's statutory duty and primary focus was enforcement of the policies contained in the Interstate Commerce Act and other transportation legislation, the ICC was obligated to consider the antitrust policies included in the Sherman Act, even though the ICC had no power or duty to enforce antitrust legislation.[249] Applying these principles to the facts before it, the dissent therefore concluded that the Commission could not simply ignore the Rehabilitation Act in a licensing proceeding when the Act is relevant.[250]

The dissent's application of the *McLean* decision is more persuasive because it reflects a more reasonable enunciation of the issue before the Court and constitutes a more realistic view of the workings of the administrative process. The issue before the Court was not whether the FCC should use standards enunciated under the Rehabilitation Act to determine if a public station had fulfilled its obligation to serve the public interest. Rather, the issue presented in *Community Television* was whether the FCC should at least consider the policy expressed in section 504 of the Rehabilitation Act that recipients of federal financial assistance should not discriminate against the handicapped when making licensing determinations concerning public stations. As the dissent noted, absent this requirement of accommodating one statutory scheme to another, congressional objectives are unlikely to be effectively promoted.[251] According to the Court's decision in *Community Television*, however, agencies such as the FCC need only consider their own regulatory legislation when making decisions concerning the "public interest."[252] As a result of the Court's restriction of the accommodation principle enunciated in *McLean* and other decisions, the broad discretion of agencies to determine the public interest is extended at the expense of any reasonable view of the administrative process. Consequently, Congress has an increased burden when enacting legislation to specifically provide that every agency which could conceivably advance the policies underlying the new statute must consider these polices when making administrative decisions.

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[245] Community Television of Southern California v. Gottfried, 459 U.S. at 509 n.14.
[246] *Id.*
[247] *See* Gottfried v. FCC, 655 F.2d at 304.
[248] *Community Television* at 514.
[249] *Id.* at 516.
[250] *Id.* at 518.
[251] *Id.*
[252] *See id.* at 510-11 n.17.

C. *The Impact of* Community Television *and Recommendations for the Future*

As a result of the *Community Television* Court's decision to continue to give the FCC great discretion in determining the components of the public interest standard, the hearing impaired are unlikely to find television more accessible through captioning in the near future. As demonstrated in a previous discussion, broadcasters are unwilling to provide captioning without a mandate and clear guidelines from the FCC, and the FCC, in the present period of deregulation, is not apt to formulate such guidelines absent an order from Congress or the courts to do so.[253] In addition to the hearing impaired, other groups are likely to find themselves in a similar position in the future with respect to access to the benefits of telecommunications. These groups may have an apparent right to service under the public interest standard but no effective means to enforce it. Children, for example, are also a segment of the population who can benefit greatly from television but who have traditionally been slighted by broadcasters and the FCC in the amount of programming provided for them.[254] Recently, in *WATCH v. FCC*,[255] the court affirmed the FCC's decision not to hold a license renewal hearing to determine if applicants who did not provide weekday programming for children were acting in the public interest.[256] Although the court found that the FCC did not unreasonably interpret its own "Children's Policy Statement" as not requiring such programming, the court stated that the evidence revealed the FCC's failure to vigorously enforce its regulations requiring service to children.[257]

Because the FCC has abrogated its duty to assure that all segments of the population enjoy the benefits of television and other forms of telecommunications and the courts are unwilling to retreat from their traditional deference to FCC decisions, Congress should review the Communications Act and the duties of the FCC. The public interest standard, as presently developed, no longer suffices to serve the underlying policies of the Act, to provide rapid and effective communication to everyone.[258] Electronic media has gained increasing importance in the dissemination of information.[259] Broadcast satellites, cable television systems and videotext will produce more changes in the way the public keeps informed.[260] Allowing the FCC to deregulate and leave control of broadcasting to the forces of the marketplace is unlikely to produce the type of information dissemination needed in a democratic society. At the very least, the present policy permits the broadcasting industry to deny access to these technological advances to a large segment of the population, the hearing impaired. Because of their handicap, the deaf can enjoy the advances of telecommunications only through television. The absence of captioning therefore denies the deaf access to the only electronic medium potentially available to them. Even though regulating an industry such as electronic communications pervasively

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[253] *See supra* notes 216-30 and accompanying text.

[254] *See* FRANKLIN, *supra* note 5, at 890.

[255] 9 Media L. Rep. (BNA) 2160 (D.C. Cir. 1983).

[256] *Id.* at 2161.

[257] *Id.* at 2165. In support of this statement, the court noted the station's meager records in the area of children's programming, a statement by the chairman of the FCC that the Children's Policy Statement was not in accord with his deregulatory stance, the recent decline in children's programming, and the existence of an FCC proposal for rulemaking which would revise or abandon the FCC policy on children's programming. *Id.*

[258] 47 U.S.C. § 151 (1976).

[259] Chamberlin, *supra* note 90, at 1110.

[260] *Id.*

via legislation may be unwise because of rapid changes in technology and because of the need to avoid government interference in the first amendment rights of broadcasters, the influence and importance of electronic media in our society should not be ignored. Congress should amend the Communications Act to assure that the FCC includes all people in the public of the public interest standard. The amendment to the Communications Act should require the FCC to assure access to telecommunications for the hearing impaired by mandating inquiry into a licensee's provision of captioned programming in hearings to establish service in the public interest.

Conclusion

Before the Court's decision in *Community Television*, the judiciary had accorded great deference to the FCC to determine the components of the public interest standard in the Communications Act. The Court had, however, found that agencies should construe the words "public interest" in accordance with the purposes of the agencies' regulatory statutes. In addition, the Court had established the principle that agencies should consider the policies underlying other relevant legislation when determining what is the public's interest.

The Supreme Court in *Community Television* retreated from its previous position and held that the FCC need not incorporate the national policy embodied in the Rehabilitation Act into the public interest standard of the Communications Act. The holding in *Community Television* reinforces the trend toward deregulation of broadcasting by affirming the discretionary power of the FCC to interpret the public interest standard as narrowly as it chooses. By allowing agencies to consider only the policies in their enabling acts, the *Community Television* Court has reaffirmed the broad powers of agencies and altered the previous principle of accommodation of policies expressed in other statutes. The Court has therefore sent Congress a message to be precise in allocating responsibilities if Congress intends particular agencies to enforce national policies that transcend their specific statutory mandates.

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